

# State of Missouri Office of Secretary of State

Case No. AP-10-17

IN THE MATTER OF:

NEAL VON NICKELS, CRD No. 733561,

Respondent.

Serve: Neal Von Nickels  
3212 South Glenstone  
Springfield, Missouri 65804

## **CONSENT ORDER**

### **SUMMARY OF ENFORCEMENT SECTION'S ALLEGATIONS**

1. The Enforcement Section of the Missouri Securities Division ("Enforcement Section") alleges that Respondent Neal Von Nickels ("Nickels" or "Respondent") engaged in dishonest or unethical practices in the securities business and that this constitutes grounds to revoke, suspend, condition or limit Nickels' registration in Missouri pursuant to Section 409.4-412(d)(13), RSMo. (Cum. Supp. 2009).
2. Respondent and the Enforcement Section desire to settle the allegations and the matters raised by the staff of the Enforcement Section relating to the alleged violations by Respondent.

### **CONSENT TO JURISDICTION**

3. Respondent and the Enforcement Section stipulate and agree that the Commissioner has jurisdiction over the Respondent and these matters pursuant to the Missouri Securities Act of 2003, Chapter 409, *et seq.*
4. Respondent and the Enforcement Section stipulate and agree that the Commissioner has authority to enter this Order pursuant to Section 409.6-604(h), RSMo. (Cum. Supp. 2009), which provides:

"The commissioner is authorized to issue administrative consent orders in the settlement of any proceeding in the public interest under this act."

### **WAIVER AND EXCEPTION**

5. Respondent waives his right to a hearing with respect to this matter.
6. Respondent waives any right that he may have to seek judicial review or otherwise challenge or contest the terms and conditions of this Order. Respondent specifically forever releases and holds harmless the Missouri Office of Secretary of State, Secretary of State, Commissioner of Securities, and their respective representatives

and agents from any and all liability and claims arising out of, pertaining to, or relating to this matter.

7. Respondent stipulates and agrees with the Enforcement Section that, should the facts contained herein prove to be false or incomplete, the Enforcement Section reserves the right to pursue any and all legal or administrative remedies at its disposal.

#### CONSENT TO COMMISSIONER'S ORDER

8. Respondent and the Enforcement Section stipulate and agree to the issuance of this Consent Order without further proceedings in this matter, agreeing to be fully bound by the terms and conditions specified herein.
9. Respondent agrees not to take any action or to make or permit to be made any public statement creating the impression that this Order is without factual basis. Nothing in this paragraph affects Respondent's (a) testimonial obligations; (b) right to take legal or factual position in defense of litigation or in defense of other legal proceedings in which the Commissioner of Securities is not a party; or (c) right to make public statements that are factual.
10. Respondent agrees that Respondent is not the prevailing party in this action since the parties have reached a good faith settlement.
11. Respondent neither admits nor denies the allegations made by the Enforcement Section, but consent to the Commissioner's Findings of Fact, Conclusions of Law and Order as set forth below solely for the purposes of this proceeding and any proceeding that may be brought to enforce the terms of this Consent Order.

#### COMMISSIONER'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

##### I. FINDINGS OF FACT

12. LPL Financial Corp. ("LPL") has been a registered broker-dealer firm in Missouri since July 18, 1983, and is a member of the Financial Industry Regulatory Authority ("FINRA"). LPL is registered with the Central Registration Depository ("CRD") with CRD number 6413. LPL has a main office address of One Beacon Street, 22nd Floor, Boston, Massachusetts 02108.
13. Respondent Nickels was registered in Missouri as an agent of LPL from August 28, 1987, through March 12, 2010. At all times relevant to this Consent Order, Nickels worked out of a branch office of LPL located in Citizens National Bank at 3212 South Glenstone, Springfield, Missouri 65804. Nickels is registered with the CRD and has CRD number 733561. Nickels currently has an application pending for registration in Missouri as an agent of MidAmerica Financial Services, Inc., CRD Number 47351.
14. On June 15, 2007, the Missouri Securities Division received a complaint from a retired seventy-six (76) year-old resident from Walnut Grove, Missouri ("MR"), concerning MR's investment with Nickels.
15. Nickels met with MR and advised MR to exchange MR's fixed annuity, valued at approximately one hundred and nine thousand, eight hundred and ninety-two dollars

and seventy-two cents (\$109,892.72), and invest in a Manulife variable annuity.

16. Prior to the exchange, Nickels told MR, among other things, that:

- a. the variable annuity would guarantee to pay MR six percent (6%) interest, payable in monthly payments of approximately five hundred and forty dollars (\$540), for the full seven (7) years of MR's annuity contract; and
- b. after seven (7) years MR's entire investment would be returned to MR.

17. MR stated that in 2007, Nickels called MR and stated, among other things, that the insurance company would buy out MR's annuity for nineteen thousand, five hundred dollars (\$19,500). Nickels stated that this amount was all that remained in the annuity because of "bad investments."

18. In a letter dated September 27, 2007, Nickels stated, among other things, that:

- a. "We [Nickels and MR] then discussed the alternatives of continuing to own the policy, or exchanging it. I explained that competition among annuity companies had led to improved features that they might want to consider. Among these was the guaranteed retirement income plan benefit feature ("GRIP") offered by Manulife. At approximately that time I had been contacted by Michael Roby, a Manulife wholesaler, who had described the GRIP feature to me and provided me with informational brochures that described its operation. As described to me by Mr. Roby, this feature worked as follows: **the contract owner would be permitted to take systematic withdrawals of no more than 6% annually from the contract. If, at the end of seven years, the contract value was less than the initial premium payment, the customer would then be permitted to annuitize the amount of the premium payment. Thus, it was my understanding that the worst-case result would be that the customer would take systematic withdrawals of up to 6% annually, and then be able to annuitize an amount equal to the premium payment after seven years.** I spoke with Mr. Roby several times, and with Manulife telephone personnel, to confirm this understanding, and was assured that my understanding was correct.

Based on these discussions with Mr. Roby and others at Manulife, I told [MR and MR's spouse] how I understood the GRIP feature worked. They agreed and signed the enclosed documents. . .

On April 11, 2007, in preparation for a meeting with [MR], I called Manulife to discuss annuitization of the premium payment amount and was advised that the amount that could be annuitized was the 'income base' of \$42,998.46. **This was contrary to what I had been told in my discussions with Mr. Roby and others at Manulife at the time that [MR and MR's spouse] purchased the contract seven years ago, and I advised Manulife of this. . . .** [Emphasis added.]

- b. Nickels did not recall what, if any, discussions had been held with MR concerning the percentage of MR's net worth concentrated in annuities;
- c. MR's risk tolerance was listed as "moderate" on the annuity paperwork; and

d. Nickels allocated MR's money to the following four aggressive subaccounts:

- i. Manufacturer's Adviser Corporation Pacific Rim Emerging Markets;
- ii. T. Rowe Price Science & Technology;
- iii. AIM Aggressive Growth; and
- iv. State Street Global Advisors Growth.

19. In a letter dated September 28, 2007, a senior compliance analyst from the variable annuity company stated, among other things, the following:

*“As explained in both the prospectus and the contract, withdrawals reduce the GRIP Income Base on a pro-rata basis. ‘An Income Base reduction on pro-rata basis is equal to the Income Base immediately prior to a partial withdrawal multiplied by the percentage reduction in Contract Value resulting from a partial withdrawal’.* [Emphasis in the original.]

For example, if the Contract Value is \$100,000 and the GRIP Income Base is \$106,000, a \$6,000 withdrawal from the contract will reduce the income base by \$6,360. The withdrawal reduced the contract value by 6% so it also reduces the Income base by 6%.

**In order to guarantee that the initial premium amount of \$109,892.72 would remain available at the end of the 7 year deferral period, the contract owner could withdraw an annual amount equal to 5.66% of the contract value. For monthly withdrawal, the percentage of Contract Value that could be withdrawn is 0.484% per month. This means that when Contract Values are increasing, a larger dollar amount could be withdrawn, and when Contract Values are decreasing a smaller amount would need to be withdrawn in order to maintain the guarantee.”** [Emphasis added.]

20. In the sale of the variable annuity to MR, Nickels, among other things:

- a. failed to adequately understand the risks and features of the variable annuity he sold to MR;
- b. misrepresented the variable annuities' GRIP rider he sold to MR; and
- c. failed to follow MR's investment objectives.

21. On March 19, 2003, Nickels did not renew his insurance license and is no longer licensed to sell insurance in Missouri.

## II. CONCLUSIONS OF LAW

22. The Commissioner finds that Respondent Neal Von Nickels:

- a. failed to adequately understand the risks and features of the variable annuity he sold to MR;

- b. misrepresented the variable annuities' GRIP rider he sold to MR; and
  - c. failed to follow MR's investment objectives.
23. Respondent Nickels engaged in dishonest or unethical practices and this conduct constitutes grounds to discipline Respondent under Section 409.4-412(d)(13), RSMo. (Cum. Supp. 2009).
24. The Commissioner, after consideration of the stipulations set forth above and on the consent of Respondent and the Enforcement Section, finds and concludes that the Commissioner has jurisdiction over Respondent and this matter and that the following Order is in the public interest, necessary for the protection of public investors and consistent with the purposes intended by Chapter 409 RSMo. (Cum. Supp. 2009).

### ORDER

**NOW, THEREFORE,** it is hereby Ordered that:

1. Respondent's registration is hereby CENSURED;
2. Respondent shall file an affidavit with the Enforcement Section within ten days of the effective date of this Consent Order that states that Respondent has not sold a variable annuity to a Missouri resident since Respondent surrendered his insurance license in Missouri on March 19, 2003;
3. Respondent shall file an affidavit with the Enforcement Section within ten days of the effective date of this Consent Order that states that he will be on heightened supervision at any employing broker-dealer registered in Missouri for a period of two years from the effective date of this order. This heightened supervision will ensure that Respondent understands and can articulate the costs and features of any product that he sells in the State of Missouri.
4. Respondent is ordered to pay the sum of nine thousand dollars (\$9,000). This amount shall be sent within ten (10) days of the effective date of this order to the Enforcement Section at 600 W. Main Street, Jefferson City, Missouri 65101 and shall be payable to the Missouri Secretary of State's Investor Education and Protection Fund;
5. Respondent is ordered to pay nine thousand dollars (\$9,000) in restitution. This payment shall be sent within ten (10) days of the effective date of this Consent Order to the Enforcement Section at 600 W. Main Street, Jefferson City, Missouri 65101, and shall be payable to the Missouri Secretary of State's Investor Restitution Fund. These payments will be sent by the Investor Restitution Fund to MR;
6. Respondent is ordered to pay two thousand dollars (\$2,000) as the cost of this investigation. This amount shall be sent within ten (10) days of the effective date of this Consent Order to the Enforcement Section at 600 W. Main Street, Jefferson City, Missouri 65101 and shall be payable to the Missouri Secretary of State's Investor Education and Protection Fund; and
7. Respondent shall pay his own costs and attorneys' fees with respect to this matter.

**SO ORDERED:**

WITNESS MY HAND AND OFFICIAL SEAL OF MY OFFICE AT JEFFERSON CITY,  
MISSOURI THIS 4<sup>TH</sup> DAY OF JUNE, 2010.

ROBIN CARNAHAN  
SECRETARY OF STATE

(Signed/Sealed)  
MATTHEW D. KITZI  
COMMISSIONER OF SECURITIES

Consented to by:  
MISSOURI SECURITIES DIVISION

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Mary S. Hosmer  
Assistant Commissioner of Securities

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Neal Von Nickels

Approved as to Form

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Doug Harpool, Attorney for Respondent  
Baird, Lightner, Millsap & Harpool, P.C.